

# **Directive Number: Pt. 15**

## **TESTIMONY, PRODUCTION AND DISCLOSURE OF MATERIAL OR INFORMATION BY HUD EMPLOYEES**

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Source: 40 FR 48123, Oct. 14, 1975, unless otherwise noted.

## **Subpart A Purpose and Policy**

### **Directive Number: 15.1 Definitions.**

As used in this part. Editorial Note: At 61 FR 5203, Feb. 9, 1996, in Sec. 15.1, the following introductory text was added; however, introductory text already exists.

The terms Department, Secretary, and Organizational unit are defined in 24 CFR part 5. Act means section 552 of title 5 U.S.C., as amended by Pub. L. 90-23, 81 Stat. 54, June 5, 1967, and Pub. L. 93-502, 88 Stat. 1561, November 21, 1974.

Person means person as defined in 5 U.S.C. 551(2) to include corporations and organizations as well as individuals.

Information center means library, reading room, desk, or other facility, or any combination of places established and maintained by the Department, where the public may request and obtain information and records concerning the Department's operations and business.

Legal proceeding includes any proceeding before a court of law or other authority, i.e., administrative board or commission, hearing officer, arbitrator or other body conducting a quasi-judicial or legislative proceeding.

Legal proceeding in which the United States is a party means any legal proceeding including as a named party the United States, the Department of Housing and Urban Development, or any other Federal executive or administrative agency or department, or any official thereof in his official capacity.

Legal proceeding among private litigants means any legal proceeding in which the United States is not a party.

[40 FR 48123, Oct. 14, 1975, as amended at 52 FR 12160, Apr. 15, 1987; 60 FR 11903, Mar. 3, 1995; 61 FR 5203, Feb. 9, 1996]

**Directive Number: 15.2 Purpose and applicability.**

(a) This part contains the regulations of the Department implementing 5 U.S.C. 552 and prescribing the Department's policies and procedures with respect to testimony of its employees as witnesses in legal proceedings. It informs the public about where and how the Department's records and information may be obtained from its organizational units as defined in Sec. 15.1(d), and about the Department's policy concerning allowing its employees to testify in legal proceedings.

(b) All subparts of part 5, other than subpart I, apply to all organizational units, except that their applicability to the Office of Inspector General is subject to the provisions of parts 2002 and 2004 of this title, and their applicability to the Office of Interstate Land Sales Registration is subject to the provisions of Sec. 1700.30 of this title. Subpart I applies to all organizational units other than the Office of Inspector General.

[52 FR 12160, Apr. 15, 1987]

**Directive Number: 15.3 Statement of policy.**

The Department's policy is one of full and responsible disclosure of its identifiable records and information consistent with such competing public interests concerning the national security, personal privacy, and obligations of confidentiality as are recognized by 5 U.S.C. 552.

## **Subpart B Production and Disclosure of Records**

**Directive Number: 15.11 Publication in the Federal Register.**

Subject to the exemptions in Sec. 15.21, the Department shall separately state and currently publish in the Federal Register for the guidance of the public:

- (a) Descriptions of its central and field organization and the established places at which, the employees from whom and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions.
- (b) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
- (c) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
- (d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Department; and
- (e) Each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to or be adversely affected by any matter required to be published in the Federal Register and not so published. For purposes of this section, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Office of the Federal Register, as provided in 1 CFR part 51.

**Directive Number: 15.12 Materials not published in Federal Register.**

- (a) Subject to the exemptions in Sec. 15.21, the Department, in accordance with this part, shall make available for public inspection and copying:
  - (1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
  - (2) Statements of policy and interpretations which have been adopted by the Department and are not published in the Federal Register; and
  - (3) Administrative staff manuals and instructions to staff that affect a member of the public.
- (b) To prevent a clearly unwarranted invasion of personal privacy, the Department may delete identifying details when it makes available or publishes any material. Whenever such

deletions are required, the record or copy will be made available with the space formerly occupied by such identifying details left blank, and the justification for the deletion shall be explained fully in writing.

(c) The Department shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this section to be made available or published. The Department shall promptly publish quarterly and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the Department shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication.

**Directive Number: 15.13 Records produced upon request when reasonably described.**

(a) The procedures for requesting access to records are set forth in subpart E of this part.

(b) When a request is made that reasonably describes a record of the Department that has been stored in a record center of the National Archives and Record Administration, this record will be requested from the Records Center by the Department and made available to the requester if the record would otherwise be available under this part. Records accessioned by the National Archives will not be made available by the Department, but may be requested directly from the National Archives.

(c) Every effort will be made to make a record in use by the staff of the Department available when requested, and such availability will be deferred only to the extent necessary to avoid serious interference with the business of the Department.

(d) Copies of a requested record need not be furnished if the record is published in the Federal Register or is available for purchase from the Superintendent of Documents of the Government Printing Office. Such records may, however, be examined in one of the Department's information centers.

[40 FR 48123, Oct. 14, 1975, as amended at 60 FR 11903, Mar. 3, 1995]

## **Subpart C Exemptions**

**Directive Number: 15.14 Fees.**

(a) Copies of records. HUD will charge \$0.15 per page for photocopies of documents. For copies prepared by computer, HUD will charge the actual cost of the tape or disk plus \$25.00 per minute for central processing unit (CPU) time, so as to recoup reasonable

direct costs of duplicating. For other methods of reproduction or duplication of documents, HUD will charge the actual direct costs of producing the documents.

(b) Manual searches for records. HUD will charge \$16.35 per hour per person for searches/reviews performed by clerical staff, and \$37.00 per hour per person for searches/reviews performed by professional staff. Charges for search/review time will be billed in 1/2 hour segments.

(c) Computer searches for records. HUD will charge \$35.00 per hour for computer programming relating to a search, plus \$25.00 per minute for central processing unit (CPU) time.

(d) Contract services. HUD will contract with private sector sources to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When doing so, however, HUD will ensure that the ultimate cost to the requester is no greater than it would be if HUD itself had performed these tasks. In no case will HUD contract out responsibilities which the FOIA provides that HUD alone may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees. HUD will ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as the National Technical Information Service, HUD will inform requesters of the steps necessary to obtain records from those sources. Information provided routinely in the normal course of business will be provided at no charge.

(e) Restrictions on assessing fees. HUD will provide the first 100 pages of duplication and the first two hours of search time, manual or computer, free of charge to noncommercial use requesters. There is no charge to noncommercial use requesters for time needed for review, as defined in paragraph (g)(4) of this section. Review time is chargeable only to commercial use requesters. HUD will only assess fees for amounts in excess of \$25.00.

(f) Payment of fees. Payment of fees under this section and under Sec. 15.16(a) shall be made by check or money order, payable to the Treasurer of the United States. Cash payments may be made in person at Headquarters or the Field Offices. The fees shall be sent to the Office of Executive Secretariat at Headquarters or to the appropriate Field Office.

(g) Definitions. As used in this subpart:

(1) Direct costs means those expenditures which HUD actually incurs in searching for and duplicating (and, in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(2) Search includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Such activity is distinguished from review of material in order to determine whether the material is exempt from disclosure.

(3) Duplication means the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others.

(4) Review means the process of examining a document located in response to a request that is for a commercial use to determine whether any portion of it may be withheld, excising portions to be withheld and otherwise preparing the document for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

[53 FR 37547, Sept. 27, 1988, as amended at 60 FR 11903, Mar. 3, 1995]

#### **Directive Number 15.15 Fees to be charged categories of requesters.**

There are four categories of FOIA requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. Specific levels of fees are prescribed for each of these categories:

(a) Commercial use requesters. (1) HUD will assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating records sought for commercial use. Requesters must reasonably describe the records sought. Commercial use requesters are not entitled to two hours of free search time or 100 free pages of reproduction of documents.

(2) Commercial use refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, HUD must determine the use to which a requester will put the documents requested. Moreover, where HUD has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, HUD will seek additional clarification before assigning the request to a specific category.

(b) Educational and non-commercial scientific institution requesters. (1) HUD will provide documents to educational and non-commercial scientific institutions for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought for furtherance of scholarly (if the request is from an

educational institution) or scientific (if the request is from a non-commercial scientific institution) research. Requesters must reasonably describe the records sought.

(2) Educational institution means a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(3) Non-commercial scientific institution means an institution that is not operated on a commercial basis as that term is referenced in Sec. 15.15(a) and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(c) Requesters who are representatives of the news media.

(1) HUD will provide documents to representatives of the news media for the cost of reproduction alone, excluding charges for the first 100 pages. In reference to this class of requester, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. Requesters must reasonable describe the records sought.

(2) Representative of the news media means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term news means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of news) who make their products available for purchase or subscription by the general public. Freelance journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but HUD may also look to the past publication record of a requester in making this determination.

(d) All other requesters. HUD will charge requesters who do not fit into any of the categories above fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. Requests from subjects for records about themselves filed in agencies' systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for reproduction. Requesters must reasonably describe the records sought.

[53 FR 37548, Sept. 27, 1988]



**Directive Number: 15.16 Review of records, aggregating requests and waiving or reducing fees.**

(a) Review of records. Only requesters who are seeking documents for commercial use may be charged for time HUD spends reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review; i.e., the review undertaken the first time HUD analyzes the applicability of a specific exemption to a particular record or portion of a record. HUD will not charge for review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable. Review time will be assessed at the same rates established for search time in Sec. 15.14.

(b) Aggregating requests. A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When HUD reasonably believes that a requester or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, HUD may aggregate any such requests and charge accordingly.

(c) Waiving or reducing fees. HUD will furnish documents without charge or at reduced charge if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. The official authorized to grant access to records may waive or reduce the applicable fee where requested. The determination not to waive or reduce the fee will be subject to administrative review as provided in Sec. 15.61 after the decision on the request for access has been made. Six factors shall be used in determining whether the requirements for a fee waiver or reduction are met. These factors are as follows:

(1) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government

(2) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(3) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to public understanding

(4) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities;

(5) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(6) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

[53 FR 37549, Sept. 27, 1988]

**Directive Number: 15.17 Charges for interest and for unsuccessful searches; Utilization of Debt Collection Act.**

(a) Charging interest. HUD will begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the billing was sent. A fee received by HUD, even if not processed, will suffice to stay the accrual of interest. Interest will be at the rate prescribed in section 3717 of title 31 U.S.C. and will accrue from the date of the billing.

(b) Charge for unsuccessful search. Ordinarily no charge for search time will be assessed when the records requested are not found or when the records located are withheld as exempt. However, if the requester has been notified of the estimated cost of the search time and has been advised specifically that the requested records may not exist or may be withheld as exempt, fees shall be charged.

(c) Use of Debt Collection Act of 1982. When a requester has failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), HUD may, under the authority of the Debt Collection Act and part 17, subpart C of this title, use consumer reporting agencies and collection agencies, where appropriate, to recover the indebtedness owed the Department.

[53 FR 37549, Sept. 27, 1988]

**Directive Number: 15.18 Advance payments.**

(a) HUD may not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) HUD estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. Then, HUD will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) Where a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), HUD may require the requester to pay the full amount owed plus any applicable interest as provided by Sec. 15.17(a) or demonstrate that he has, in fact, paid the fees, and to make an advance payment of the full amount of the estimated fee before HUD begins to process a new request or a pending request from that requester.

(b) When HUD acts under paragraphs (a)(1) or (a)(2) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after HUD has received fee payments described above.

(c) Where it is anticipated that either the duplication fee individually, the search fee individually, or a combination of the two exceeds \$25.00 over and above the free search time and duplication costs, where applicable, and the requesting party has not indicated in advance a willingness to pay so high a fee, the requesting party shall be promptly informed of the amount of the anticipated fee or such portion thereof as can readily be estimated. The notification shall offer the requesting party the opportunity to confer with agency representatives for the purpose of reformulating the request so as to meet that party's needs at a reduced cost.

[53 FR 37549, Sept. 27, 1988]

**Directive Number: 15.21 Exemptions authorized by 5 U.S.C. 552.**

A requested record shall not be withheld from inspection or copying unless it both: Comes within one of the classes of records exempted by 5 U.S.C. 552; and there is need in the public interest to withhold it. In determining the scope of the classes of records described in paragraph (a) of this section, the Attorney General's Memorandum on the Public Information Act, June 1967, will be used as a guide.

(a) The classes of records authorized to be exempted from disclosure by 5 U.S.C. 552 are those which concern matters that are:

(1) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of the Department;

(3) Specifically exempted from disclosure by statute;

(4) Except as otherwise provided in paragraph (c) of this section, trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Department;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a state, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the Department in connection with its responsibility for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this section.

(c) Subject to the following conditions, financial and related information submitted by a mortgagor and contained in Form HUD-92410 (Statement of Profit and Loss), or a HUD-approved substitute form that the mortgagor may have submitted, may be disclosed to eligible potential purchasers of HUD-held multifamily mortgages.

(1) Information from Form HUD-92410 concerning a project may be made available in conjunction with the sale of a HUD-held mortgage covering that project conducted under the authority of sections 207 (k) and (1) of the National Housing Act, 12 U.S.C. 1713 (k) and (1), or section 7(i)(3) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535 (i)(3).

(2) The release of this information by HUD to eligible potential purchasers shall be limited to the period specified by HUD for the mortgage sale.

(3) Eligible potential purchasers who have received this information shall agree to keep the information confidential, to disclose the information only to potential investors in the mortgage, to use the information for the sole purpose of their evaluation of the mortgage in connection with the mortgage sale, and to follow disclosure procedures for that sale that have been established by the Secretary.

(4) Any disclosure by eligible potential purchasers to potential investors in the mortgage shall be limited to the period specified by HUD for the mortgage sale. Similar, potential investors in the mortgage shall agree to keep the information confidential and to use the information for the sole purpose of their evaluation of the mortgage in connection with their investment decision. In addition, potential investors in the mortgage may not disclose the information to other entities, unless the disclosure is necessary for the investor's evaluation of the mortgage, is in accordance with disclosure procedures for the specific sale that have been established by the Secretary, and is limited to the period specified by HUD for the mortgage sale. Any potential purchaser is responsible for notifying potential investors in the mortgage who receive this information from that entity of the investors' obligations under this section.

(5) Disclosure of information from Form HUD-92410 by an eligible potential purchaser or by a potential investor (who has received the information from a potential purchaser and has been notified by that entity of its obligations under paragraph (c)(3) of this section) that is not in accordance with this section is a violation of this regulation and may subject the entity making the unauthorized disclosure to administrative sanctions under 24 CFR part 24.

(Approved by the Office of Management and Budget under control number 2502 [40 FR 48123, Oct. 14, 1975, as amended at 51 FR 44286, Dec. 9, 1986; 60 FR 11903, Mar. 3, 1995]

## **Subpart D [Reserved]**

## **Subpart E Procedures for Requesting Access to Records**

**Directive Number: 15.41 Requests for records.**

(a) Requests for copies of records may be made in person during normal business hours at information centers listed in Sec. 15.31 or by mail addressed to such centers. Although oral requests may be honored, a requester may be asked to submit his request in writing.

(b) Each request must reasonably describe the desired record including the name, subject matter, and number or date, where possible, so that the record may be identified and located. In order to enable the Department to comply with the time limitations set forth in Sec. 15.42, the envelope containing a written request and the letter itself should both clearly indicate that the subject is a Freedom of Information Act request.

(c) The request shall be accompanied by an agreement to pay a fee to be determined in accordance with Sec. 15.14. Under the circumstances enumerated in Sec. 15.18, the Department may refuse to furnish records before receipt of the appropriate fee. A requester may specify a limit for fees, above which the requester is not willing to pay without advance consultation with the Department.

(d) Copies of available records shall be made as promptly as possible. Copying service shall be limited to not more than 10 copies of any single page. Records which are published or available for sale need not be reproduced.

[40 FR 48123, Oct. 14, 1975, as amended at 60 FR 11904, Mar. 3, 1995]

**Directive Number: 15.42 Time limitations.**

(a) Upon receipt of a request for records, the appropriate office will determine within ten working days whether to comply with such requests. The office will either agree to provide the requested documents, or will notify the requester, in writing, of an adverse determination, the reasons therefor, and the right to appeal the denial to the:

(1) General Counsel, with respect to a denial issued by the Office of the Executive Secretariat or by the offices in which there is a Field Assistant General Counsel; or

(2) Field Assistant General Counsel, with respect to a denial issued by the Field Offices.

(b) When a request for records is misdirected by the requester, the office receiving the request shall:

(1) Promptly refer it to the appropriate office; and

(2) Advise the requester that the time of receipt by the appropriate office will be the time of receipt for processing purposes.

(c) A determination by the General Counsel or the Field Assistant General Counsel with respect to an appeal under Sec. 15.61 shall be made within 20 working days after receipt of the appeal, and shall be communicated to the appellant, in writing.

(d) In unusual circumstances, the General Counsel, or the appropriate Field Assistant General Counsel, may extend the time limits prescribed in paragraphs (a) and (c) of this section, by written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. An extension shall not exceed ten working days. As used in this paragraph, unusual circumstances means that there is a need:

(1) To search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) To search for, collect, and examine appropriately a voluminous amount of separate and distinct records that are demanded in a single request; or

(3) For consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more organizational units of the Department having a substantial interest in the subject matter of the request.

[60 FR 11904, Mar. 3, 1995]

## **Subpart F Disclosure of Records and Refusal To Disclose**

### **Directive Number: 15.51 Authority to release records or copies.**

The Office of the Executive Secretariat in Headquarters and the FOIA liaisons in each Field Office are authorized to release copies of any Department records upon written request unless disclosure is clearly not appropriate under this part.

[60 FR 11904, Mar. 3, 1995]

### **Directive Number: 15.52 Authority to deny requests for records.**

The officers described in Sec. 15.51, or other official designated by the Secretary's Representative, may deny a request for a record only with the concurrence of the appropriate program counsel in Headquarters or counsel in the Field Offices. Any denial shall:

(a) Be made in writing, describing the documents denied and, if fewer than 21, listing them specifically;

- (b) Contain a simple reason for the denial, stating the appropriate exemption used; and
- (c) Advise of the right to appeal the adverse determination, in accordance with Sec. 15.61, to the:
  - (1) General Counsel, with respect to a denial issued by the Office of Executive Secretariat or by offices in which there is a Field Assistant General Counsel; and
  - (2) Field Assistant General Counsel, with respect to a denial issued by Field Offices.

[60 FR 11904, Mar. 3, 1995]

**Directive Number: 15.54 Business information.**

(a) In general. Business information provided to the Department by a submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) Definitions. As used in this section:

Business information means commercial or financial information provided to the Department by a submitter that arguably is protected from disclosure under Exemption 4 (42 U.S.C. 552 (b)(4)) of the Act.

Submitter means any person or entity who provides business information, directly or indirectly, to the Department. The term includes, but is not limited to, corporations, State governments, and foreign governments.

(c) Designation of business information. A submitter's claim that certain information is confidential or proprietary should be supported by a statement or certification by an officer or authorized representative of the submitter that the information is, in fact, confidential or proprietary and has not been disclosed to the public. All information considered confidential or proprietary by a submitter should be clearly designated with a prominent stamp, typed legend, or other suitable form of notice, stating "Confidential Treatment Requested by [insert name of submitter]", which should appear on each page or segregable portion of the page. If such marking is impractical, a cover sheet prominently marked "Confidential Treatment Requested by [insert name of submitter]" should be securely attached to the information for which confidential treatment is requested. These designations shall be deemed to have expired 10 years after the date of the submission, unless the submitter requests, and provides reasonable justification for, a longer period of designation.

(d) Notice to submitter. To the extent permitted by law, the Department shall provide a submitter with prompt written notice of a FOIA request or administrative appeal encompassing its business information, unless notice is excused under paragraph (h) of this section. Such notice shall afford the submitter an opportunity to object to disclosure



pursuant to paragraph (f) of this section. The notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information. The Department will provide this notice whenever:

(1) The information has been designated in good faith by the submitter as information deemed protected under Exemption 4; or

(2) The Department has reason to believe that the information may be protected from disclosure under Exemption 4.

(e) Notice to requester. At the same time the Department notifies the submitter, the Department shall also notify the requester that the request is subject to the provisions of this section and that the submitter is being afforded an opportunity to object to disclosure of the information.

(f) Opportunity to object to disclosure. Through the notice described in paragraph (d) of this section, the Department shall afford a submitter or its designee 10 Federal working days to provide the Department a detailed written statement of the submitter's objection to disclosure of any portion of the information it submitted to the Department. Such statement shall specify all grounds for withholding any of the information and shall demonstrate why the information is a trade secret or commercial or financial information that is privileged or confidential. Conclusory statements that particular information would be useful to competitors or would impair sales, or similar statements, generally will not be considered sufficient to justify confidential treatment. Information provided by a submitter or its designee pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(g) Notice of intent to disclose. The Department shall consider carefully a submitter's objections and specific grounds for nondisclosure, before determining whether to disclose business information. If the Department decides to disclose business information over the objection of a submitter, the Department shall forward to both the submitter and the requester a written notice of intent to disclose. The written notice shall be forwarded 10 Federal working days before the specified disclosure date and shall include:

(1) A statement of the reasons for which the submitter's disclosure objections were not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date.

(h) Exceptions to the notice requirement. The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

(1) The Department determines that the information should not be disclosed;

(2) The information has been published lawfully or has been made available officially to the public;

(3) Disclosure of the information is required by law (other than the Act);

(4) Disclosure of the information is required by a departmental regulation that:

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the Department that are to be released under the FOIA; and

(iii) Provides for notice in exceptional circumstances when the submitter provides, at the time the information is submitted or a reasonable time thereafter, written justification that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(5) The information requested was not designated by the submitter as exempt from disclosure in accordance with paragraph (c) of this section at the time of the submission of the information or a reasonable time thereafter, unless the Department has substantial reason to believe that the disclosure of the information would cause competitive harm; or

(6) The designation made by the submitter in accordance with paragraph (c) of this section appears obviously frivolous. In such circumstances, the Department shall forward to the submitter, 10 Federal working days before a specified disclosure date, written notice of any final administrative decision to disclose business information.

(i) Notice of FOIA lawsuit. Whenever a requester brings suit seeking to compel disclosure of business information, the Department shall promptly notify the submitter.

(j) Determination of confidentiality. HUD will make no determination as to the validity of any request for confidentiality until a request for disclosure of the information is received.

(k) Current mailing address for the submitter. Each submitter shall provide to the Department:

(1) A mailing address for receipt of any notices under this section; and

(2) Notice of any change of address.

(l) Treatment of confidential information by HUD employees.

(1) HUD officers and employees shall not, directly or indirectly, use or allow the use of business information obtained through or in connection with Government employment that has not been made available to the general public.

(2) Except as otherwise provided in this section, HUD officers and employees may not disclose business information, except to other HUD officers or employees who are properly entitled to such information for the performance of their official duties.

[60 FR 11904, Mar. 3, 1995]

## **Subpart G Administrative Review of Denial of Requests for Records**

### **Directive Number: 15.61 Administrative appeal.**

(a) Appeal shall be available only from a written denial of a request issued under Sec. 15.52, and only when the appeal is filed within 30 days of issuance of the denial. An appeal from a denial issued by the Office of Executive Secretariat or by offices in which there is a Field Assistant General Counsel must be mailed to the Assistant General Counsel for Training and Administrative Law, Room 10246, 451 Seventh Street, SW, Washington, DC, 20410. An appeal from a denial issued by a Field Office must be mailed to the appropriate Field Assistant General Counsel. An appeal must include a copy of the original request for records; a copy of the written denial of access to those records, and a statement of the reasons, circumstances, or arguments advanced in support of, or in opposition to, disclosure of the records. The envelope containing the appeal should be clearly marked as a Freedom of Information Act appeal, so that the Department can comply with the time limitations set forth in Sec. 15.42.

(b) When an appeal is misdirected by the requester, the Office receiving the appeal shall:

(1) Promptly refer it to the:

(i) Assistant General Counsel for Training and Administrative Law, if the denial was issued by the Office of Executive Secretariat or by an office in which there is a Field Assistant General Counsel, or

(ii) Appropriate Field Assistant General Counsel, if the denial was issued by a Field Office;  
and

(2) Advise the appellant that the time of receipt for processing purposes will be the time the appeal is received by the appropriate office.

(c) The appeal determination shall be in writing; constitute final administrative action by the Department; and, if the denial is upheld in full or in part, include notification of the right to judicial review.

[60 FR 11905, Mar. 3, 1995]

## **Subpart H Production in Response to Subpoenas or Demands of Courts or Other Authorities**

### **Directive Number: 15.71 Purpose and scope.**

This subpart contains the regulations of the Department concerning procedures to be followed when a subpoena, order, or other demand (hereinafter referred to in this subpart as a demand) of a court or other authority is issued for the production or disclosure of:

- (a) Any material contained in the files of the Department;
- (b) any information relating to material contained in the files of the Department, or
- (c) any information or material acquired by any person while such person was an employee of the Department as a part of the performance of his or her official duties or because of his or her official status.

For purposes of this subpart, the term employee of the Department includes current and former officers and employees of the United States appointed by or subject to the supervision of the Secretary, but does not include officers and employees covered by part 2004 of this title. Also for purposes of this subpart, files of the Department do not include files of the Office of Inspector General covered by part 2004 of this title.

[49 FR 11160, Mar. 26, 1984, as amended at 60 FR 58456, Nov. 27, 1995]

### **Directive Number: 15.72 Production or disclosure prohibited unless approved by the Secretary.**

- (a) Any demand of a court or other authority or any request to an employee of the Department to produce any material contained in the files of the Department, or to disclose any information relating to material contained in the files of the Department, or to disclose any information or produce any material acquired as a part of the performance of the employee's official duties or because of the employee's official status for use in a legal proceeding, shall state with particularity the material sought to be obtained or the information sought to be disclosed.
- (b) No employee of the Department shall comply with any such demand or request without the prior approval of the Secretary.
- (c) In determining whether to grant approval for an employee of the Department to testify in a legal proceeding, the Secretary shall follow the standards set forth in subpart I.

(d) Where the demand or request seeks only the production of documents, the Department's procedure for authenticating documents by a keeper of the records shall be the Department's method for response. That authentication shall be evidence that the documents are true copies of documents in the Department's files.

[52 FR 12160, Apr. 15, 1987]

**Directive Number: 15.73 Procedure in the event of a demand for production or disclosure.**

(a) Whenever a demand is made upon an employee of the Department for the production of material or the disclosure of information described in Sec. 15.71, the employee shall immediately notify the Secretary and either the General Counsel or the appropriate Regional Counsel. The appropriate Regional Counsel shall mean the Regional Counsel for the Regional Office having delegated authority over the project or activity with respect to which the information is sought. If possible, the Secretary shall be notified before the employee concerned replies to or appears before the court or other authority.

(b) If response to the demand is required before the instructions from the Secretary are received, the U.S. Attorney or such other attorney as may be designated for the purpose, will appear with the employee of the Department upon whom the demand has been made, and will furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration of the Secretary. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested instructions from the Secretary.

[52 FR 12160, Apr. 15, 1987]

**Directive Number: 15.74 Procedure in the event of an adverse ruling.**

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with Sec. 15.73(b) pending receipt of instructions from the Secretary, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the Secretary not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand (United States ex rel. Toughy Ragen, 340 U.S. 462).

[52 FR 12161, Apr. 15, 1987] Source: 52 FR 12161, Apr. 15, 1987, unless otherwise noted.

## **Subpart I Testimony of Employees of the Department in Legal Proceedings**

### **Directive Number: 15.81 Purpose.**

(a) This subpart prescribes the policies and procedures of the Department with respect to testimony of its employees as witnesses in legal proceedings with respect to material contained in the files of the Department or information learned as part of the performance of their official duties or because of their official status.

(b) For purposes of this subpart, the term employee of the Department includes current and former officers and employees of the United States appointed by or subject to the supervision of the Secretary, but does not include officers and employees covered by part 2004 of this title.

[52 FR 12161, Apr. 15, 1987, as amended at 60 FR 58457, Nov. 27, 1995]

### **Directive Number: 15.82 Testimony in proceedings in which the United States is a party.**

(a) In any legal proceeding in which the United States is a party, an employee of the Department may not be called to testify as an expert or opinion witness by any party other than the United States, but may be called by such non-federal party to testify as to facts.

(b) Whenever, in any legal proceeding in which the United States is a party, the attorney in charge of presenting the case for the United States requests it, the Secretary shall arrange for an employee of the Department to testify as a witness for the United States.

### **Directive Number: 15.83 Legal proceedings among private litigants; general rule.**

In any legal proceeding exclusively among private litigants, no employee of the Department may testify as an expert or opinion witness as to any matter related to his or her duties or the functions of the Department, including the meaning of Departmental documents.

### **Directive Number: 15.84 Legal proceedings among private litigants; subpoenas.**

Whenever, in a legal proceeding exclusively among private litigants, an employee of the Department is served with a subpoena or is requested to testify, the procedures set forth in Secs. 15.72-15.74 shall be applicable.

### **Directive Number: 15.85 Legal proceedings among private litigants; expert or opinion testimony.**

If, while testifying in a legal proceeding exclusively among private litigants, an employee of the Department is asked for expert or opinion testimony, the employee shall decline to answer on the grounds that he or she is forbidden to do so by this part.

## **Subpart J Processing Request for Declassification and Release of Classified Material**

### **Directive Number: 15.91 Authority for release or denial of classified material.**

(a) All requests by the public, Government employees, or other Government agencies, for the release of classified information shall be directed to the Inspector General, who will ensure that:

(1) All requests are acknowledged within 10 working days.

(2) The request is immediately coordinated with the original classification authority to determine whether the association of that authority with the classification of the information requires protection.

(3) In those instances when the answer to paragraph (a)(2) of this section is requests will be referred, along with the requested document and if appropriate any recommendations to withhold, for direct handling by the original classification authority. The requester shall be advised in writing of this action.

(4) Whenever it is necessary, by either the original classification authority or HUD to deny the declassification and release, in whole or part, of the requested information, the requester shall be notified, in accordance with Executive Order 12356, of:

(i) The reason for the denial,

(ii) The requesters' right to appeal the denial, and

(iii) The name, title, and address of the appellate authority.

[44 FR 54478, Sept. 20, 1979, as amended at 48 FR 15895, Apr. 13, 1983. Redesignated at 52 FR 12161, Apr. 15, 1987]